

NO. 48466-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DAVID JEREMY FOX,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
COWLITZ COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00645-1

BRIEF OF RESPONDENT

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DATED September 22, 2016, Port Orchard, WA

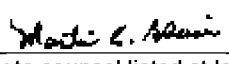

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Fox fails to show he is entitled to a new trial because his former counsel was elected county prosecutor where he never raised the issue in the trial court and cannot show any prejudice where former counsel was screened from the case after his election?

2. Whether Officer Epperson's comment that the transaction "looked like" a drug deal, to which Fox did not object at trial, was proper lay opinion testimony?

3. Whether Fox fails to show that it was prosecutorial misconduct to refer in closing to evidence that was admitted without objection?

4. Whether Fox fails to show that counsel provided ineffective assistance in not objecting to Epperson's testimony, the State's closing argument or Sawyer's reference to his conversation with Canales?

5. Whether Fox fails to show cumulative error that would warrant a new trial?

6. Whether the Court should award appellate costs if the state substantially prevails in this appeal?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

David Jeremy Fox was charged by information filed in Cowlitz

County Superior Court with delivery of methamphetamine in a school zone. CP 12. After trial, a jury found Fox guilty as charged. CP 122-23.

B. FACTS

Longview Police Officers Kevin Sawyer and Rocky Epperson set up a buy with confidential informant John Canales. RP (12/17) 87, 147, 151. Canales was “working off” charges. RP (12/17) 88. Canales did not ultimately complete his contract with the police. RP (12/17) 88. He was prosecuted on the original charges and went to prison. RP (12/17) 88.

On the date of the buy, Sawyer and Detective Epperson met with Canales in the parking lot at the Three Rivers Mall. RP (12/17) 88-89, 152. Canales provided the target. RP (12/17) 89. Canales was on a bicycle. RP (12/17) 89. They searched him and his bicycle and gave him \$55 to make the buy. RP (12/17) 89, 90, 153.

Sawyer followed Canales in his car, and Epperson proceeded to a separate surveillance spot in his van. RP (12/17) 91, 154. Canales proceeded to 911 Mill Street in Kelso on his bike. RP (12/17) 92. It was Canales’s home. RP (12/17) 93. Canales did not contact anyone else during the trip. RP (12/17) 92.

Once Epperson radioed that he could see Canales, Sawyer proceeded to his own surveillance spot, which ended up being a parking space right next to Epperson. RP (12/17) 91, 93, 155. Their view of the

residence was unobstructed. RP (12/17) 93. Canales hands were visible. RP (12/17) 95.

Before Fox arrived, Canales pretended to be working on his bike in the front yard. RP (12/17) 97, 155. Fox approached up Eleventh Avenue, which ended across from Canales's house. RP (12/17) 98, 156. Epperson turned on his video camera when he saw him. RP (12/17) 156.

Fox and Canales spoke. RP (12/17) 98, 157. No one else approached Canales while they observed him. RP (12/17) 98. Fox retrieved something from his right coin pocket. RP (12/17) 98. Canales pulled an envelope from his back pocket and they had a hand-to-hand exchange, and Fox left. RP (12/17) 98, 157.

Canales returned to the meeting spot at the mall. RP (12/17) 99. Sawyer followed him. RP (12/17) 99. Canales did not make contact with anyone between the house and the mall. RP (12/17) 99, 158. They again got into the van and Canales handed Sawyer a bag of what was subsequently determined to be methamphetamine. RP (12/17) 99-100, RP (12/18 A) 14. They again searched Canales and his bike. RP (12/17) 100, 159.

The State also presented evidence that the location was within a 1000 feet of a school bus stop and that the substance Canales purchase had been tested and was methamphetamine. RP (12/17) 192; RP (12/18 A) 14.

Fox called Canales, who testified that he thought maybe Fox had informed on him before his prior arrest. RP (12/18 A) 23. Canales confirmed that he contacted the officers before meeting at the mall with the purpose of arranging something with Fox and that he was not using the day of the buy. RP (12/18 A) 29, 31-124. He also confirmed that he met Fox at his house, gave the money to Fox, and obtained the meth in exchange. RP (12/18 A) 40, 44, 46.

Fox also called private investigator Anthony Nicosia, who some 10 years earlier had been a narcotics officer in Nevada. RP (12/18 A) 59-60. Vice Narcotics Bureau 18 years. RP (12/18 A) 60. He was generally critical of the officers' conduct of the buy. RP (12/18 A) 90-95. He conceded on cross, however that he was not familiar with Washington law on matters such the requirements for searches, third-party recording of telephone conversations, or the reliability of informants. RP (12/18 A) 107-11.

Fox testified on his own behalf, and admitted he had four forgery convictions, the most recent in 2013. RP (12/18 A) 129, 147. Fox was friends with Canales's brother's girlfriend and lived four blocks from Canales. RP (12/18 A) 134-35. Canales called and as a result he took a wheel bearing to Canales. RP (12/18 A) 136. He denied bringing him any meth. RP (12/18 A) 146. On cross Fox asserted that Canales pulled the

mail out of his pocket for no apparent reason before taking the bearing from him. RP (12/18 A) 149.

III. ARGUMENT

A. FOX IS NOT ENTITLED TO A NEW TRIAL BECAUSE HIS FORMER COUNSEL WAS ELECTED COUNTY PROSECUTOR WHERE HE NEVER RAISED THE ISSUE IN THE TRIAL COURT AND CANNOT SHOW ANY PREJUDICE WHERE FORMER COUNSEL WAS SCREENED FROM THE CASE AFTER HIS ELECTION.

Relying on *State v. Stenger*, 111 Wn.2d 516, 522, 760 P.2d 357 (1988), Fox argues that he is entitled to a new trial because after his initial appearance on Fox's behalf, but before trial, his attorney was elected prosecutor for Cowlitz County. This Court should decline to consider this claim because, although he was clearly aware of the factual basis for this claim, Fox failed to raise it before the trial court. Further, the record is absolutely devoid of any evidence that Fox's former counsel in any way participated in the prosecution of the case or assisted or even discussed the case with the deputy prosecutor who tried the case.

1. Fox fails to show any manifest error justifying consideration of this claim for the first time on appeal.

Fox asserts that a superior court's decision not to disqualify a prosecutor is reviewed de novo, citing *State v. Greco*, 57 Wn. App. 196, 200, 787 P.2d 940, *review denied*, 114 Wn.2d 1027 (1990). As he also

notes, however, more recent authority suggests an abuse of discretion standard. *State v. Orozco*, 144 Wn. App. 17, 19, 186 P.3d 1078, *review denied*, 165 Wn.2d 1005, 198 P.3d 512 (2008) (*citing State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004)).

Here, regardless of the standard, there is no decision to review because Fox never moved to disqualify the prosecutor or his office in the trial court. Notably, the Court in *Orozco* declined to consider issues regarding the recusal of the prosecutor's office that had not been raised on appeal. *Orozco*, 144 Wn. App. at 21. So should this Court.

As a general rule, Washington appellate courts will not consider an argument that was not first presented to the trial court. RAP 2.5(a). As the Supreme Court noted in *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007), appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct. Failure to object deprives the trial court of this opportunity to prevent or cure the error. If raised on appeal only after losing at trial, a retrial may be required with substantial consequences. Such is clearly the case here. Fox or his counsel could not reasonably have been unaware that his former counsel was elected as Prosecuting Attorney, when he was elected after he assumed representation of Fox.

Nevertheless, an exception exists in the case of manifest error

affecting a constitutional right. RAP 2.5(a)(3). To determine if review is appropriate under the rule, a two-fold inquiry is made. First, the court determines whether the claimed error is truly of constitutional magnitude, and second the court must determine whether the error is “manifest.” To show that alleged error is “manifest” error, the defendant must show actual prejudice, meaning a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009) (quoting *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted)). An alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Should the appellate court then determine that a claim of manifest constitutional error has been raised, “it may still be subject to a harmless error analysis.” *O’Hara*, 167 Wn.2d at 98, 217 P.3d 756.

Because this issue was not raised below, the record is inadequate to determine whether manifest constitutional error exists. Assuming *arguendo*, that Fox’s claim presents an issue of constitutional magnitude,¹ he cannot show that the error is manifest, *i.e.*, that there were “practical

¹ The United States Supreme Court has held only an actual conflict of interest that adversely affected counsel’s performance violates the Sixth Amendment. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Washington follows that rule. *State v. Dhaliwal*, 150 Wn.2d 559, 568–571, 79 P.3d 432 (2003). The State acknowledges that the *Mickens/Dhaliwal* rule is an imperfect fit in the present context. It has not, however, found any precedent that discusses any constitutional underpinning of the *Stenger* rule.

and identifiable consequences in the trial of the case.” *O’Hara*, 167 Wn.2d at 99.

The record does not show that any confidences Fox may have revealed to Jurvakainen were used at trial. Indeed, the State’s only witnesses regarding the salient facts of the case were the two officers who directly followed the informant and watched and videoed the transaction.² Nothing in the questions asked of or the answers given by these witnesses suggests that they or the trial prosecutor were privy to any of Fox’s confidences. Nor is there any indication that any confidence of Fox was used in the cross-examination of his witnesses. There simply is no evidence that the non-recusal of the prosecutor’s office affected the trial of the case or that the “Chinese wall” erected after Jurvakainen’s election was breached. Fox fails to show manifest error affecting a constitutional right and this Court should decline to address this issue.

2. Even if the Court were to consider the issue, Fox fails to show that the remedy is reversal.

No case cited by Fox requires reversal unless there is evidence that the former defense counsel actively prosecuted the defended or provided information or assistance to the attorneys actively prosecuting him. For example, Fox cites to *Young v. State*, 177 So.2d 345 (Fla. App. 1965).

² The State presented three other witnesses: two who established that the location was within a school zone and the lab tech who tested the methamphetamine.

That case was subsequently clarified by the Florida Supreme Court, which held that there was no error unless the “former defender turned prosecutor can ... act[s] directly against his former client in a related matter, []or provide[s] information or assistance for those who would so act.” *Thompson v. State*, 246 So. 2d 760, 763 (Fla. 1971). This appears to still be the law in Florida. *Lot v. State*, 13 So. 3d 1121, 1125 (Fla. App. 2009).

Similarly, in *State v. Leigh*, 178 Kan. 549, 289 P.2d 774, 775-76 (1955), former defense counsel actually prosecuted the case. In subsequent cases, however, Kansas courts have declined to reverse where “there was no actual breach of confidence or prejudice shown.” *State v. McKibben*, 239 Kan. 574, 722 P.2d 518, 525 (1986). Likewise, *Burkett v. State*, 131 Ga. App. 662, 206 S.E.2d 848, 850 (1974), former defense counsel had participated in the actual trial of the case against the defendant. But in *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351, 357 (1987) (citing *Davenport v. State*, 157 Ga. App. 704, 278 S.E.2d 440 (1981)), the Georgia Supreme Court explained that reversible error only occurred where the conflicted attorney actively participated in the prosecution.

The State has similarly found no Washington case that mandates reversal in the absence of evidence that former counsel actually participated in the prosecution of the case. Notably *Stenger* itself came

before the Court on a pretrial petition for review. *Stenger*, 111 Wn.2d at 517. Obviously it did not rule on whether reversal would be an appropriate remedy.

Fox had ample opportunity to raise this issue before he was tried, but chose not to. The record does show that former counsel was in any way involved in the prosecution, directly or indirectly, of the present case. To the contrary, the only record evidence shows that former counsel scrupulously screened themselves from any involvement in the case. CP 158-16. In the absence of any showing of prejudice Fox should not be rewarded for his own inaction below with an unwarranted “second bite at the apple.” This claim should be rejected.

B. OFFICER EPPERSON’S COMMENT THAT THE TRANSACTION “LOOKED LIKE” A DRUG DEAL, TO WHICH FOX DID NOT OBJECT AT TRIAL, WAS PROPER LAY OPINION TESTIMONY.

Fox next claims that Epperson’s testimony constituted an impermissible comment on his guilt. This claim is without merit because it was not preserved for appeal, and the testimony was proper lay opinion testimony based on actual observation. Moreover, Fox cannot show prejudice where Epperson was thoroughly cross-examined on the issue, and where the CI was searched before and after the buy, and was never out of the officer sight.

Fox may only challenge the testimony as an impermissible opinion for the first time on appeal if he demonstrates that it is a manifest constitutional error. *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). To so do, he must identify a constitutional error and show how the alleged error actually affected his rights at trial. “It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *Kirkman*, 159 Wn.2d at 926-27 (citations omitted).

Allowing impermissible opinion testimony about the defendant’s guilt violates the right to an independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 927. But “[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error. Rather, “[m]anifest error’ requires a nearly explicit statement by the witness.” *Kirkman*, 159 Wn.2d at 936. As the Supreme Court has explained:

Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

Requiring an explicit or almost explicit statement by a witness is also consistent with this court’s precedent that it is improper for any witness to express a personal opinion on the defendant’s guilt.

Kirkman, 159 Wn.2d at 936–37 (citations omitted).

A witness may thus give “‘opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue.”⁴ *State v. Farr Lenzini*, 93 Wn. App. 453, 462, 970 P.2d 313 (1999) (quoting ER 701); *see also State v. Fisher*, 74 Wn. App. 804, 814, 874 P.2d 1381 (1995) (testimony is not an impermissible opinion about guilt if it is an inference “that would be drawn by any reasonable person.”). On the other hand, “no witness ... may opine as to the defendant’s guilt, whether by direct statement or by inference.” *Farr Lenzini*, 93 Wn. App. at 459-60.

The line between these rules is not difficult to discern. A lay witness may give an opinion or inference based on what he or she saw or otherwise perceived, if “helpful” to the jury. ER 701. This is true even if what the witness saw was “an ultimate issue to be decided by the trier of fact” as, for example, the commission of the crime charged. ER 704. On the other hand, a lay witness may not give an opinion or inference not based on what he or she saw or otherwise perceived, *e.g.*, *State v. Carlson*, 80 Wn. App. 116, 124, 906 P.2d 999 (1995), and a witness may not testify in terms of guilt or innocence. *E.g.*, *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985). “Whether testimony constitutes an impermissible opinion ... depends upon the circumstances in each case,” *State v. Baird*, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997) (*citing State v. Cruz*, 77 Wn. App. 811, 814-15,

894 P.2d 573 (1995)), and relevant factors “include the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence presented.” *Baird*, 83 Wn. App. at 485.

Here, Fox fails to show that the challenged testimony amounted to an explicit personal opinion of his guilt. The officer did not offer an opinion or personal belief of Fox’s guilt or innocence or comment directly on the credibility of a witness. Evidence is not improper opinion testimony if it indirectly comments on a defendant’s guilt or credibility and is helpful to the jury and based on inferences from the evidence. *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). Rather, the testimony was simply about his observations, was based on the officer’s experience, and still left to the jury the question of whether a sale of methamphetamine occurred. Thus, Fox fails to demonstrate any error, much less manifest constitutional error that may be raised for the first time.

As the Court observed in *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573 (1995):

Even after the detective testified, the jury still had to decide (1) whether to believe the detective, and (2) the ultimate issue of whether the other evidence presented demonstrated Cruz’s guilt of the crime charged. As such, the testimony was not an impermissible expression of the detective’s opinion as to Cruz’s guilt.

The cases Fox relies on can be distinguished. For example, in

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), the State charged the defendant with possessing pseudoephedrine with intent to manufacture methamphetamine. At trial, officers and a forensic chemist expressed their personal belief that the defendant and an accomplice “were, in fact, buying ingredients to manufacture methamphetamine,” “purchased [the items] for manufacturing,” and “possessed [pseudoephedrine] with intent.” *Montgomery*, 163 Wn.2d at 588. Because these opinions explicitly commented on the defendant’s intent and “went to the core issue and the only disputed element” in the case, they were improper. *Montgomery*, 163 Wn.2d at 594-95. The court noted that it would have been proper for the detective to testify that “[t]he chemicals possessed and the manner in which they were obtained was consistent with intent to manufacture methamphetamine.” *Montgomery*, 163 Wn.2d at 594 n.8.

Here, Epperson never explicitly commented on Fox’s intent or guilt. To the contrary, he merely commented that the transaction “*looked like* a drug deal,” RP (12/17) 157, which was based on his personal observation that “they both reach[ed] into their pockets and then they [did] a hand-to-hand exchange.”³ *Id.* This testimony was not improper. *See also State v. Sanders*, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992).

³ Epperson also testified about his experience as a narcotics officer. RP (12/17) 147-49.

In addition, under *Kirkman*, Fox must also show how the alleged error worked to his prejudice. He fails to meet this burden. As noted, Epperson only stated that the transaction “looked like” a drug deal. Here the jury was played a video of the transaction, RP (12/17) 161, so they could well determine for themselves whether Epperson’s opinion was supported by his observations. Moreover, Fox’s counsel went over the video multiple times. During her cross-examination of Epperson while playing the video, RP (12/17) 173, counsel specifically addressed the transaction:

Q A little bit farther.

And what is [Canales] getting out now?

A I can’t see. I can see his hand in his back pocket.

Q But you can’t see what he’s taking out; is that right?

A True.

Q So, would you say we don’t know what he’s taking out of his pocket?

A I do not know what he’s taking out of his pocket.

RP (12/17) 175. She also addressed Fox’s side of the transaction with Epperson:

Q Now, let’s take a look. See what we see with Mr. Fox. Maybe just –

A [Inaudible].

Q -- and gives Mr. Canales something. Do you know – can you see what he gave him?

A It looks like a piece of plastic, kind of a clear – I mean, it’s not --

Q Would you say it’s pretty fuzzy?

A Yeah.

Q Would you say we don't know what he's handing him?

A I cannot tell you a hundred percent what he's handing him.

RP (12/17) 175-76. She returned to this idea more than once:

Q (By Ms. VanRollins:) So, you testified that you can't -- or you said you can't -- you can't see what's in Mr. Fox's hand, it's fuzzy?

A Correct.

Q And you would agree we do not see any money coming out of Mr. Canales's pocket?

A On the video I did not see any money.

Q And we saw that there were five -- supposedly five bills on that exchange --

A Okay, that's the first time I've seen --

Q -- [inaudible].

A -- the five, okay.

Q You saw the flash of the hand?

A Yes.

Q And nobody was counting money; right?

A At the --

Q Because we didn't see any; right?

RP (12/17) 178-79.

In addition to this cross-examination, counsel also went over the video with Fox, RP (12/18 A) 141-44, and with the defense expert Nicosia. Nicosia opined that in the video, one could not see anything change hands. RP (12/18 A) 91-93. He also testified that "[w]e cannot see the exchanges of anything, so I cannot make an opinion as to what it

is.” RP (12/18 A) 94.

Moreover, both officers testified that they searched Canales before and after the transaction and that Canales was never out of their sight between the two searches. Canales left with money, met with Fox, and returned with methamphetamine. Canales, who was called by Fox, testified that the exchange happened. In short, even if the comment was inappropriate, there is no plausible way it could have affected the verdict. This claim should be rejected.

C. FOX FAILS TO SHOW THAT IT WAS PROSECUTORIAL MISCONDUCT TO REFER IN CLOSING TO EVIDENCE THAT WAS ADMITTED WITHOUT OBJECTION.

Fox next claims that the prosecutor committed misconduct by briefly mentioning Epperson’s testimony that the transaction looked like a drug deal. This claim is without merit because the argument was a direct reference to testimony that had been admitted without objection or limitation.

If a defendant fails to object to misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 442–43, 258 P.3d 43 (2011). The Court focuses more on

whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Fox does not meet this burden.

The cases Fox relies upon, such as *State v. Jungers*, 125 Wn. App. 895, 902, 106 P.3d 827 (2005), hold that it is improper for the State to refer to facts not in evidence closing. As Fox notes in his brief, in *Jungers*, the prosecutor referred to evidence that the court had stricken.

Here, on the other hand, the prosecutor briefly mentioned testimony that had been introduced into evidence without objection. There was thus no misconduct.

Further, as discussed above, the testimony itself comprised one sentence out of the entire trial, and the prosecutor likewise made a single reference to it during his closing. As also discussed above, counsel thoroughly cross-examined the witnesses regarding the transaction, but the evidence was simply overwhelming: Canales was never out of sight of the two officers between the time he was initially searched and given the buy money and the time he returned with the drugs and was searched again. This claim should be rejected.

D. FOX FAILS TO SHOW THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN NOT OBJECTING TO EPPERSON'S TESTIMONY, THE STATE'S CLOSING ARGUMENT OR SAWYER'S REFERENCE TO HIS CONVERSATION WITH CANALES.

Fox next claims that counsel was ineffective for failing to object to Epperson's testimony and to the State's reference to it in closing argument. This claim is without merit because generally for the reasons previously discussed, and as to the third claim, because.

To prevail on this claim, Fox must demonstrate both deficient performance and prejudice, *i.e.*, a reasonable probability that, but for counsel's omissions, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). He must overcome a strong presumption of effective assistance, *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009), and demonstrate "in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336. Whether to object to evidence is a classic example of a tactical decision, and only in egregious circumstances concerning evidence central to the State's case will the failure to object warrant reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

1. Fox fails to show deficiency or prejudice with regard to Epperson's testimony or the reference to that testimony in closing argument.

With regard to counsel's failure to object to Epperson's brief comment and the related, also brief, reference to it in closing, Fox has demonstrated neither deficient performance nor prejudice. Contrary to Fox's assertions, the record discloses tactical bases for not objecting to Epperson's statement.

First, as discussed above, the testimony was proper. *See State v. Gerds*, 136 Wn. App. 720, 728, 150 P.3d 627 (2007) (counsel not deficient for failing to make an objection that was substantively without merit). Secondly, it is a valid tactic to not object to avoid highlighting the evidence. *State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014) ("The decision to object, or to refrain from objecting even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective"). Further, as discussed previously, counsel addressed the video of the transaction on cross and during the testimony of Fox and Nicosia and argued what could and could not be seen. Counsel might well have thought it would be more effective to pick apart the assertion rather than object to it.

Further, for the reasons discussed in the previous two sections of

this brief, Fox also fails to show that the outcome of trial would have been different if counsel had objected.

2. *Fox fails to show counsel was ineffective for not objecting to Sawyer's brief hearsay statement.*

Next, Fox argues that counsel was ineffective for not objecting to Sawyer's testimony that Canales said Fox had agreed to sell him \$55 worth of methamphetamine. The State concedes that this statement was hearsay. However, as noted above, counsel could have validly chosen to not object to avoid highlighting the comment.

Moreover, Fox cannot show prejudice. The officers' testimony established that Canales was given \$55 and returned with the methamphetamine. Canales was never out of sight during the interim and the transaction was videoed and the video was played for the jury. Further, was called by Fox Canales testified at trial. Although he did not testify specifically that Fox agreed to sell him methamphetamine for \$55, he did testify that he arranged the buy from Fox, and that he met Fox and completed the buy. RP (12/18 A) 29, 40, 44, 46. Had an objection been interposed and sustained there is no reasonable probability that the outcome of the trial would have been different. This claim should also be rejected.

E. FOX FAILS TO SHOW CUMULATIVE ERROR THAT WOULD WARRANT A NEW TRIAL.

Fox finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Fox fails to even show multiple trial errors. This contention is without merit.

F. THE COURT SHOULD AWARD APPELLATE COSTS IF THE STATE SUBSTANTIALLY PREVAILS IN THIS APPEAL.

Under RCW 10.73.160(1), this court “may require an adult offender convicted of an offense to pay appellate costs.” As this Court has recognized, the statute gives this court discretion concerning as to the award of costs. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016); *see State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). Fox claims that because the trial court found him to be indigent, costs should presumptively be denied. This argument ignores both the language and

the history of RCW 10.73.160.

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is “An Act Relating to indigent persons.” Laws of 1995, ch. 275. RCW 10.73.160(3) expressly provides for “recoupment of fees for court-appointed counsel.”

Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. “Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure.” “In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law.” *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. *See State v. Keeney*, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295 (1989). In civil cases, the rule was that “[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs.” *Pilch v. Hendrix*, 22 Wn. App. 531,

534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Two Supreme Court cases provide examples of circumstances under which costs would be denied: *National Electrical Contractors Assoc. (NECA) v. Seattle School Dist. No. 1*, 66 Wn.2d 14, 400 P.2d 778 (1965); and *Water Dist. No. 111 v. Moore*, 65 Wn. App. 392, 397 P.2d 845 (1964). In *NECA*, the court decided the merits of a moot case. It refused to award costs because the “appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved.” *NECA*, 65 Wn.2d at 23.

In *Moore*, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: “While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal.” *Moore*, 66 Wn.2d at 393.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues

raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. This Court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the Court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This Court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. *Blank*, 131 Wn.2d at 242. From then until 2015, this Court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its

enforcement, especially where the Legislature has silently acquiesced in that construction over a long period.” *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. *See* Laws of 2015, ch. 265, § 22 (eliminating statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents as issues of the admission of evidence, prosecutorial misconduct, and as argued above, a conflict issue in which there was no pre-trial objection from or prejudice to Fox. Fox litigated the case for his own benefit, not for any public interest. Indeed, the equities favor the State, since Fox chose not to raise timely objections that could have obviated the appellate issues. Nothing in this case supports permanently shifting the costs of the defendant’s appeal from the guilty defendant to the innocent taxpayers.

If this Court focuses on the defendant’s ability to pay, nothing in

the record indicates that he is physically incapable of finding employment after his release. At trial Fox testified that he owns his own home and supported himself by collecting Social Security disability payments along with doing “a lot of” mechanic work.⁴ RP (12/18 A) 127-29. Moreover, he is only 38 years old. CP 2. This suggests that he will have the ability to pay the costs in the future.

This Court should award costs. If it turns out that payment creates manifest hardship, Fox can move for remission under RCW 10.73.160(4). If accrual of interest creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

⁴ Although the Supreme Court recently held that SSI payments are not to be considered in weighing ability to pay, *Richland v. Wakefield*, No. 92594-1 (Sept. 22, 2016), it is clear that Fox has other sources of income and assets. See *Wakefield*, Slip Op. (Madsen, J., concurring) at 2 (“nonexempt funds, even if commingled with Social Security benefit monies, are not protected from levy or attachment.”).

IV. CONCLUSION

For the foregoing reasons, Fox's conviction and sentence should be affirmed, and costs awarded to the State.

DATED September 22, 2016.

Respectfully submitted,

RYAN JURVAKAINEN

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A handwritten signature in black ink, appearing to be 'RS' followed by a long horizontal stroke.

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KITSAP COUNTY PROSECUTOR

September 22, 2016 - 3:50 PM

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